Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–24–212 OF 2000
ZAINUN ALI J
31 JULY 2001

Companies and Corporations — Accounts — Inspection — Rights of directors to inspect accounts — Whether such right an absolute right

Companies and Corporations — Accounts — Inspection — Improper motives for — Burden of proving improper motives, upon whom

Companies and Corporations — Auditor — Undertaking — Statutory and conditional undertaking — Non-compliance with statutory requirements — Whether undertaking valid

Companies and Corporations — Directors — Accounts — Inspection of — Absolute rights of directors to inspect accounts — When such rights lost

Companies and Corporations — Directors — Accounts — Inspection of — Rights of directors to inspect accounts — Whether such right an absolute right

This was the plaintiffs' application, pursuant to s 167(6) of the Companies Act 1965, for an order that the accounts and other records of the defendant be open for inspection by a qualified auditor acting for the plaintiffs. The grounds of the plaintiffs' application were that since the defendant is a public listed company, it is requisite that an accredited independent auditor be appointed to inspect and interpret the information obtained during inspection, as the plaintiffs did not comprehend and were unfamiliar as to how company records are maintained. The first plaintiff's further submitted that his 'absolute' right to inspect the accounts and other records of the defendant flowed from his office as a director, and were necessary to enable him to perform his duties as a director, and that no reason need be given by him to inspect the accounts and other records. The plaintiffs gave an undertaking, purportedly under s 167(6) of the Companies Act 1965 not to reveal any information obtained by the auditor after their inspection, except to themselves as directors The defendant countered that the director's absolute right to inspect accounting and other records would be lost where it is exercised not to advance the interest of the company but to injure it, or where it is done for some other ulterior purpose. The defendant cited instances of apparent bad faith by the plaintiffs and also contended that the plaintiffs' alleged ignorance of accounting and other record was feigned. This was because the first plaintiff was the chairman of a public listed company and of various other companies. Further, as the plaintiffs were directors of the defendant, they owed certain statutory duties, which duties ensured that they would be kept informed of the defendant's financial affairs. The plaintiffs had also all along approved the defendant's annual accounts and possessed credentials as evidence of accounting and financial skills. The defendant also submitted that since it was an exempt private company, the privacy of its accounts had to be maintained, especially when

A the plaintiffs had not adduced reasons why an internal auditor should inspect its private records.

Held, dismissing the application with costs:

(1) The right of a director to inspect the accounting and other records of a company is a common law right, the existence of which is recognized in the Companies Act 1965. This right of a director is concomitant with the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. It is must be exercised for the benefit of the company. Pursuant to s 165 of the Companies Act 1965, the obligation of a company to allow inspection by its directors of its accounting and other records is mandatory. This 'absolute right' indicates that by virtue of his office, a director is prima facie entitled to inspection and is not required to demonstrate any particular ground or 'need to know' as a basis (see paras 30–36, 40).

(2) This right of inspection is unqualified but where it is proven that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to facilitate that process by inspecting the books, then his right to inspection is completely dissipated. In so holding, the court in effect is not exercising 'a residual discretion' in such a situation, but is satisfied, on the basis of the evidence before it that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes, such as with a view of causing detriment to the company and that the director is thus abusing the confidence reposed in him as director (see paras 44–46).

(3) The burden of proving that the right of inspection will be exercised for improper motives will be on the party who so asserts. Thus, in the instant case, the defendant had to show clear proof and satisfy the court that the right of inspection would be detrimental to its interests. In short, there had to be a 'real ground' that the right would be abused, and that a great deal of harm would be caused to the company thereby (see paras 47–51).

(4) In the instant case, the High Court was satisfied that the intention of the plaintiffs in inspecting the books was not out of altruistic motives. However, although the High Court was inclined to view that the plaintiffs had manifested strong propensities of acting in breach of their fiduciary duty towards the defendant, the court was reluctant to find that the burden of proof had been discharged since no 'real ground' could be positively asserted (see paras 59–62).

(5) In the instant case, the undertaking furnished by the auditor did not meet with the express requirements of s 167(6) of the Companies Act 1965. The undertaking was not addressed to the court or to anyone in particular and the auditor had extended the class of persons to whom he could disclose the results of his inspection. The language of s 167(6) is precise and is therefore more than just an adjunct. It is clear that though the right to inspect accounting and other records under s 167(6) requires the court to exercise its discretion in allowing auditors

to inspect such records on behalf of the directors concerned, the discretion reposed in the court must be grounded on the precise requirements under statute. This means that when the undertaking is conditional, the conditions must be fulfilled before the undertaking will be enforced. On the facts, the letter of undertaking being defective for non-compliance with statutory requirements, the High Court's discretion had not arisen, and consequentially it was precluded from considering this application at all (see paras 76, 79–80).

[**Bahasa Malaysia summary**

Ini adalah permohonan plaintif-plaintif, mengikut s 167(6) Akta Syarikat 1965 untuk satu perintah bahawa akaun-akaun dan laporan-laporan lain defendan didedahkan untuk pemeriksaan oleh seorang juruaudit pihak plaintif-plaintif. Alasan permohonan plaintif-plaintif adalah memandangkan bahawa syarikat defendan adalah syarikat awam yang disenaraikan, ia merupakan keperluan bahawa seorang juruaudit bebas yang diikitiraf dilantik untuk memeriksa dan mentafsirkan maklumat yang diperoleh semasa pemeriksaan, oleh kerana plaintif-plaintif tidak memahami dan tidak biasa dengan cara rekod syarikat dikekalkan. Plaintif pertama menyatakan bahawa hak 'absolute'nya untuk memeriksa akaun-akaun dan rekod-rekod lain defendan berpunca daripada tugas beliau sebagai pengarah, dan beliau tidak perlu memberi sebab-sebab untuk memeriksa akaun-akaun dan rekod lain. Plantif-plaintif telah memberi akujanji, di bawah s 167(6) Akta Syarikat 1965 suapaya tidak mendedahkan sebarang maklumat yang diperolehi juruaudit setelah pemeriksaan mereka, kecuali kepada mereka sendiri sebagai pengarah. Defendan telah menyatakan bahawa hak pengarah untuk memeriksa rekod-rekod akaun dan lain akan hilang di mana pengurus itu tidak menggunakan haknya untuk memperkembangkan syarikat itu tetapi untuk memudaratkannya, atau di mana ia digunakan untuk tujuan lain. Defendan telah memberi contoh niat jahat oleh plaintif-plaintif dan juga menyatakan bahawa kejahilan plaintif-plaintif mengenai perakaunan dan rekod-rekod lain telah dibuat-buat. Ini adalah kerana plaintif pertama adalah pengerusi kepada syarikat awam yang disenaraikan dan juga syarikat-syarikat lain. Lagipun, plaintif-plaintif sebagai pengarah-pengarah defendan perlu menjalankan beberapa tanggungjawab undang-undang, termasuk plaintif-plaintif mesti sentiasa diberitahu keadaan kewangan defendan. Plaintif-plaintif juga selama ini membenarkan akaun tahunan defendan dan mempunyai kelayakan sebagai bukti kemahiran perakaunan dan kewangan. Defendan juga telah menyatakan bahawa memandangkan bahawa ia adalah syarikat swasta yang dikecualikan, keadaan berahsia akaunnya perlu dikekalkan, terutamanya apabila plaintif-plaintif tidak memberi alasan kenapa seorang juruaudit dalaman patut memeriksa rekod-rekod peribadinya.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Hak seorang pengarah untuk memeriksa rekod-rekod perakaunan dan rekod lain sebuah syarikat adalah hak common law, yang diiktirafkan

oleh Akta Syarikat 1965. Hak pengarah seperti ini adalah diiringi oleh tanggungjawab fidusiari niat baik, ketelitian, kemahiran dan ketekunan yang pengarah bertanggungjawab kepada syarikat. Ia hendak digunakan untuk kebaikan syarikat. Menurut s 165 Akta Syarikat 1965, kewajipan sebuah syarikat untuk membenarkan pemeriksaan oleh pengarah ke atas perakaunannya dan rekod-rekod lain adalah mandatori. 'Absolute right' ini menunjukkan bahawa melalui pangkatnya, seorang pengarah adalah prima facie berhak untuk memeriksa dan tidak perlu menunjukkan sebarang alasan atau 'need to know' sebagai dasar (lihat perenggan-perenggan 30–36, 40).

(2) Hak untuk memeriksa ini tidak bersyarat, tetapi jika dapat ditunjukkan bahawa pengarah sedang bertindak atau akan bertindak melanggar tanggungjawab fidusiarinya kepada syarikat dan akan memudahkan proses itu dengan memeriksa buku-buku itu, maka hak memeriksanya lupus. Di dalam memutus sedemikian, mahkamah tidak menggunakan 'residual discretion' di dalam keadaan itu tetapi berpuas hati bahawa berdasarkan keterangan dihadapannya niat pengarah untuk membuat pemeriksaan buku-buku and rekod-rekod adalah untuk menggunakan maklumat ini untuk tujuan lain dan pengarah itu menyalahgunakan keyakinan yang diberikan kepadanya sebagai pengarah (lihat perenggan-perenggan 44–46).

(3) Beban membukti bahawa hak memeriksa akan digunakan untuk sebab-sebab yang tidak betul jatuh pada parti yang mengatakannya. Oleh itu, di dalam kes ini, defendan perlu menunjukkan bukti yang jelas dan memuaskan mahkamah bahawa hak pemeriksaan akan memudaratkan kepentingannya. Pendek kata, perlu ada 'real ground' bahawa hak itu akan disalahgunakan, dan syarikat akan mengalami kemudaratan (lihat perenggan-perenggan 47–51).

(4) Di dalam kes ini, Mahkamah Tinggi berpuas hati bahawa niat plaintif-plaintif di dalam memeriksa buku-buku bukan altruistik. Walau bagaimanapun, walaupun Mahkamah Tinggi cenderung kepada pandangan bahawa plaintif-plaintif telah menunjukkan kecenderungan yang kukuh bertindak melanggar tanggungjawab fidusiari mereka terhadap defendan, mahkamah enggan memutuskan bahawa beban bukti telah dilepaskan memandangkan tiada 'real ground' ditunjukkan dengan positif (lihat perenggan-perenggan 59–62).

(5) Di dalam kes ini, akujanji yang diberi oleh juruaudit tidak mematuhi keperluan nyata s 167(6) Akta Syarikat 1965. Akujanji itu tidak dialamatkan ke mahkamah atau kepada sesiapa khususnya dan juruaudit telah melanjutkan kelas orang yang beliau dapat mendedahkan keputusan pemeriksaan beliau. Bahasa s 167(6) adalah tepat dan adalah lebih daripada tambahan. Ia jelas bahawa walaupun hak memeriksa rekod-rekod perakaunan dan rekod lain di bawah s 167(6) memerlukan mahkamah menggunakan budibicaranya untuk membenarkan juruaudit memeriksa rekod-rekod seperti itu bagi pihak pengarah-pengarah, budibicara pada mahkamah mesti berdasarkan

peruntukan undang-undang. Ini bermakna bahawa di mana akujanji itu bersyarat, syarat-syarat itu hendak dipatuh sebelum akujanji itu dapat dikuatkuasakan. Pada fakta-fakta surat akujanji adalah cacat kerana terdapat ketidakpatuhan peruntukan undang-undang, Mahkamah Tinggi tidak mempunyai budi bicara, dan mahkamah tidak dapat mempertimbangkan permohonan ini (lihat perenggan-perenggan 76, 79–80).]

Notes

For cases on accounts of directors, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 132–135.

For cases on inspection of account, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 5–7.

For cases on undertaking of auditors generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 50–57.

Cases referred to

Berlei Hestia (NZ) Ltd v Feryhough [19801 1 SLR 673 (refd)
Caparo Industries PLC v Dickman & Ors [1990] 1 All ER 568 (refd)
Choe Kuan Him, Advocate & Solicitor, T Damodran, Re v Choe Kuan Him [1975] 1 LNS 143 (refd)
Conway & Ors v Petronius Clothing Co Ltd & Ors [1978] 1 All ER 185 (refd)
Dato Aw Kow v Haw Par Brothers (Pte) Ltd & Anor [1972] 2 MLJ 225 (refd)
Edman v Ross [1922] 22SR (NSW) 35 (refd)
Funerals of Distinction Pty Ltd, Re [1963] NSWR 614 (refd)
Haw Par Bros (Pte) Ltd v Dato' Aw Kow [1973] 2 MLJ 169 (refd)
Michael C Solle v United Malayan Banking Corporation [1984] 1 CLJ 151 (refd)
Molomby v Whitehead & Australian Broadcasting Corp [1985] 63 ALR 282 (refd)
Welch v Britania Industries Pte Ltd [1993] 1 SLR (refd)
Welch & Anor v Britannia Industries Pte Ltd [1993] 1 SLR 673 (refd)
Wuu Khek Chiang George v ECRC Land Pte Ltd [1999] 3 SLR 65 (refd)

Legislation referred to

Companies Act 1965 s167(1), (3), (6), 169(1)

MK Yee (Sheam Delamore & Co) for the plaintiff.
Lim Kian Leong (Lim Kian Leong & Co) for the defendant.

Zainun Ali J:

[1] In the plaintiffs application to inspect the accounting and other records of the defendant company under s 167(6) of the Companies Act 1965, several issues surfaced, not least with regards to questions of absolute rights under the common law and statutory requirements in connection therewith.

BRIEF FACTS

[2] As can be recounted, the plaintiffs are the directors of the defendant company and have been so, for the better part of the decade.

[3] The defendant company is a company incorporated as a public company on 7 June 1972,

[4] The plaintiffs' application is in pursuance of s167(6) of the Companies Act 1965, for an order that the record of accounts and other records of the defendant company be open for inspection by a qualified auditor one Yee Eng Seng, acting for the plaintiffs, within 30 days of the order. Section 167(6) of the Companies Act 1965 reads as follows:

> (6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

[5] The grounds of the plaintiffs' application is that since the defendant is a public listed company, it is requisite that an accredited independent auditor be appointed to inspect and interpret the information obtained during inspection, as the plaintiffs do not comprehend and are unfamiliar as to how company records are maintained.

[6] All the plaintiffs have purportedly given an undertaking not to reveal any information obtained by the auditor after their inspection, except to themselves as directors.

[7] The said undertaking is a requirement under s167(6) Companies Act 1965. The plaintiffs' undertaking, purportedly made in pursuance of the above s 167(6) reads thus:

> Letter of Undertaking
>
> Undertaking *During* Inspection of the records of
>
> Tan Chong Consolidated Sdn Bhd
>
> 1 Yeo Eng Seng, an approved company auditor and a partner of Ernst & Young, act for Dato' Tan Kim Hor, Tan Kheng Leong @ Tan Hoy Shoi, Tan Kang Leong and Tan Boon Pun.
>
> Save as required by law or a court order, I hereby undertake not to disclose or otherwise make available to any third party any information acquired during an inspection of the accounting and other records of Tan Chong Consolidated Sdn Bhd *except to those of my officers, employees appointed servants or agents who are required by me in the course of the inspection to receive andconsider the information and to*: (Emphasis added.)
>
> Dato' Tan Kim Hor;
>
> Tan Kheng Leong @ Tan Hoy Shoi;
>
> Tan Keng Leone; and
>
> Tan Boon Pun

who are directors of Tan Chong Consolidated Sdn Bhd *and/or their appointed servants/agents of the same*. (Emphasis added.)

This undertaking shall not apply to information or document which is or has already have been made lawfully available to the public and this undertaking is governed by and shall be construed in accordance with Malaysian law.

Yours faithfully

Yeo Eng Seng

Partner

Ernst & Young

Dated this: 22 August 2000

THE FACTS

[8] The plaintiffs were the majority on the Board from 1985 until 25 August 2000. They were in effective control of the day to day management of the defendant for more than 15 years up until just three days before, the originating summon was filed. Thus from 1985 until 25 August 2000, the defendant company had seven directors, four of whom were the plaintiffs, and two additional directors were appointed on 25 August 2000 at the EGM of the defendant company.

[9] It is to be noted that the letter of undertaking from the auditor is dated 22 August 2000 and the originating summons was filed three days later, ie on 25 August 2000.

[10] It is a fact that the plaintiffs voted to reappoint the auditors on 25 August 2000 at the EGM. It is also a fact that the auditors have offered to assist the plaintiffs to explain the accounts, but the offer was not taken up.

[11] It is a fact that the first plaintiff regularly signs the accounts of the defendant company, including the last audited accounts for the year 1999. In fact, the plaintiffs have approved the accounts of the defendant company, every year, including the latest accounts just three days before the originating summons was filed.

[12] It would be fair to say that the plaintiffs for the past 15 years, have been exercising control and management over the preparation of defendant company's accounts.

THE FIRST PLAINTIFFS' CASE

[13] It is the first plaintiffs' case that as director, his right to inspect accounts and other records of the company is unfettered.

[14] The first plaintiff went on to say that at common law now codified in statute, a director has the right of inspection of any documents such as accounting and other records of the company.

[15] It is also the first plaintiffs' case that his right flowed from his office as a director, to enable him to perform his duty as a director, and that no

reason need be given by him to inspect the accounting and other records. The first plaintiff stressed that the right of a director to inspect the accounting and other records of the company has been described as 'absolute' — see *Dato Aw Kow v Haw Par Brothers (Pte) Ltd & Anor* [1972] 2 MLJ 225.

[16] However in *Haw Par*, Wee Chong Jin CJ observed that whilst s 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under s 167(1), this right is reposed only in persons who are then directors of the company.

[17] This right does not extend to ex-directors. If an ex-director wishes to inspect such accounts and other records, he must rely on other grounds and not on s 167(3).

THE DEFENDANT' SCASE

[18] In response, the defendant concedes that whilst it is the general rule that a director's right to inspect accounting and other records is an absolute right, the corollary of this is that, that right would be lost where it was exercised not to advance the interest of the company but to injure it, or it is done for some other ulterior purpose.

[19] The defendant cited instances of apparent bad faith by the plaintiffs' through the flurry of affidavits filed between the parties.

[20] Briefly as could be observed, the affidavit of Tan Kim Hor (the first plaintiff) affirmed on 21 April 2001 at paras 11, 15 and 17, deny any intention of filing a winding up petition.

[21] However on 21 May 2001, the plaintiffs did just that. A winding up petition was filed. In fact, exh D to the petition enclosed a letter of 7 September 1999 and memorandum showing their intention to do so. This same intention is again reflected in a letter of 18 April 2001 from the plaintiffs' solicitor which the defendant says, should be read together with a second memorandum.

[22] The defendant contends that since the plaintiffs had never, at any time, alleged any wrongdoing or irregularity in the accounting or other records of the defendant, for the plaintiffs to now surreptitiously prepare themselves to wind up the defendant company in doing what they did, which amongst others seek to inspect the defendant company accounts, therefore appears dubious and by the same token, speaks of motives which may not be entirely innocuous.

[23] Another area of dissension which the defendant raised, is the issue of the plaintiffs alleged ignorance of accounting and other records, which ignorance, defendant claim, is feigned.

[24] The defendant says that as the first plaintiff is the chairman of Tan Chong Motor Holding, a public listed company since 1973 and of various other companies within the Tan Chong Group, his involvement in the

management, including financial, is total. In fact, the defendant contends that the plaintiffs as directors, owe statutory duties to keep proper accounting and other records as will sufficiently explain and give a fair and true view of the financial status of the company and to review and give a report on the financial status of the company. These statutory duties are designed to ensure that directors will keep themselves informed about the financial affairs of the company.

[25] The defendant now asserts that since the plaintiffs had all along approved the annual accounts by the defendant company, it is not open for them to now plead ignorance of interpretation of the accounting information which they had themselves signed and approved. In fact, the defendant said that for the plaintiffs to now declare ignorance, tantamounts to perjury, since they had made declarations (as directors) that the accounts give a 'true and fair view' of the state of the company.

[26] The defendant also provided evidence of the plaintiffs' credentials as persons who have accounting and financial skills and defendant asserts that to profess their ignorance now is not only mischievous but perjurious.

[27] The defendants also noted that none of the plaintiffs had alleged wrongdoing or dissatisfaction with the accounts or records of the defendants, much less seek assistance from the defendant's auditors in interpreting the accounts for them.

[28] It is also the defendant's case that being an exempt private company, the privacy of their accounts must be maintained, a fortiori when the plaintiffs themselves have not adduced any reason why an internal auditor should inspect the defendant's private records.

[29] The defendant further affirmed that since there is no management dispute, the plaintiffs application is therefore suspect, consequentially placing this application in the category of abuse of process of court.

THE LEGAL POSITION

[30] Firstly, this court shall deal briefly with the extent of the right of a director of a company to inspect the accounting and other records of the company.

[31] Though the right of director to inspect the accounting and other records is a common law right, the limits of the rights should not be ascertained by categorizing it as a common law right or a statutory right.

[32] Since the right had its origins from the common law before being embodied in statute, the issue is, was it modified in the process of codification.

What is the exact position?

[33] It is this. The right exists but it is a right conferred by common law and not by statute. Thus, the relevant provision in the Companies Act 1965, recognizes the existence of this right at common law.

[34] This explains the criminal sanctions imposed, in the event proper books of account are not kept or not made available for inspection or in the event of a breach of any of the other duties imposed by the section.

[35] Thus, the right of a director to inspect accounting and other records is concomitant with the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. It is implicit therefore that this right must be exercised for the benefit of the company.

[36] The language of s 167 shows the obligation of the company to allow inspection by its directors of the accounting and other records, as mandatory. As authorities such as *Caparo Industries PLC v Dickman & Ors* [1990] 1 All ER 568 have shown, company directors are required by law under s 169(1) Companies Act 1965, to lay the company accounts at its Annual General Meeting before its members.

[37] In the words of Lord Jauncey in the above case, the purpose of the annual accounts so far as members are concerned is:

> … to enable them to question the past management of the company, to exercise their voting rights, if so advised, and to influence future policy and management.

[38] Thus, this right has often been described as 'absolute' (see *Haw Par Bros (Pte) Ltd v Dato' Aw Kow* [1973] 2 MLJ 169). In *Welch & Anor v Britannia Industries Pte Ltd* [1993] 1 SLR 673, the court observed that the right of inspection is an absolute right. However, the court there went on to say that 'absolute right' does not translate into entitling the director to inspect books and accounts in all circumstances without restriction, but rather that the right flows from his office and he does riot have to justify his desire to inspect.

[39] As succinctly put by Street CJ, in *Edman v Ross* [1922] 22SR (NSW) 35, the director cannot be called upon to furnish his reasons before being allowed to exercise the right and in the absence of clear proof to the contrary, the court must assume that he will exercise it for the benefit of the company.

[40] Thus, 'absolute right' indicates that by virtue of his office, a director is prima facie entitled to inspection and ex hypothesis, he has the nght of access and is not required to demonstrate any particular ground or ' need to know' as a basis.

[41] It is interesting to note that in *Molomby v Whitehead & Australian Broadcasting Corp* [1985] 63 ALR 282, Benmont J of the Federal Court of Australia said:

> In my opinion, in declining access to Molomby [the director requesting for inspection] the company fell into an error of law. The error consisted of a failure to recognize that, as a Director of the corporation, Molomby had a prima facie entitlement to access to the corporate material and that, in the absence of good cause to the contrary and none existed here, Molomby should be permitted to inspect the documents nominated by him.

[42] Slade J in *Conway & Ors v Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185, inter alia, concluded that the right exists at common law, but the court is left with a residue of discretion as to whether or not to order inspection.

[43] The judge went on to observe that though a director will not be called upon to furnish his reason before being allowed to exercise his right of inspection, the court would in such a case, restrain him in the exercise of the right, if satisfied affirmatively that his intention was to abuse the confidence reposed in him as director arid materially to injure the company and that in the absence of clear proof to the contrary, the court would assume that he was exercising it for the benefit of his company.

[44] However, Mahon J in *Berlei Hestia (NZ) Ltd v Fernyhough* (T198Q) 2 NZLR 150, took a slightly different approach from Slade J. His Lordship disagreed that there was a residual discretion in the court to refuse inspection. Justice Mahon's view is that the right of inspection is unqualified but that where it is proven that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to facilitate that process by inspecting the books, then his right to inspection is completely dissipated.

[45] This court is of like view. It is therefore this court's approach that where the court disallows a director his right of inspection of the books and other records of the company, the court in effect is not exercising 'a residual discretion.' The court in such a situation, is satisfied, on the basis of the evidence before it that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes, such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him as director.

[46] This court observes that a director's right to inspect the books and records of the company is vital for him in the performance of his duty as director, including the duty to ensure that the company complies with the requirement as to accounts set out in the Companies Act 1965. This right is crucial, as the books and records of a company are a primary and sometimes, the only source of information as to the state of affairs of a company.

Burden of proof

[47] On whom lies the burden that the right is being or will be exercised for improper purpose?

[48] The ready answer to that is, on the person who asserts it, per Isaacs J in *Australian Metropolitan Life Assurance Co Ltd v Ure* [1923] 33 CLR 199.

[49] The defendant in this case therefore has to show clear proof and satisfy this court affirmatively that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. In short, there must be a 'real ground' that the right would be abused, and that a great deal of harm would be caused to the company thereby.

[50] Reverting to the facts in the instant case, the issue is whether the first plaintiffs' conduct in the present case is sufficient to justify this court denying him his right of inspection.

[51] Given the apparent guile employed by the plaintiffs to inspect the records aforementioned, it would be irresistible to conclude that theirs is a case, calculated to create a general air of misgiving with regards the well-being of the company.

[52] Just consider the plaintiffs vehement denial of intention to file a winding up petition (affirmed on 22 March 2001), only later to have that intention coming to pass, when the plaintiffs did file the said petition on 25 October 2000.

[53] Consider the plaintiffs' demur on their accounting knowledge, when in fact each one of them have varying levels of knowledge of accounting. Consider too the plaintiffs omission to disclose that they were in effective control of the day to day management of the defendant for more then fifteen years up until just three days before the originating summons was filed.

[54] Consider also the plaintiffs denial that the defendant company is an exempt private company, when in fact the first plaintiff had, for the last six years claimed it to be so, when he signed certificates to that affect.

[55] This court however concedes that the above facts and the fact that the plaintiffs had not expressed dissatisfaction with the defendant company's auditors may be irrelevant to the plaintiffs right of inspection.

[56] It may also be irrelevant that the plaintiffs voted to re-appoint the said auditors; or that no reasons were given by the plaintiffs to inspect the accounting and other records.

[57] However, these facts in their entirety, when viewed in the context of the plaintiffs conduct, especially the plaintiffs *volte* face in petitioning to wind up the defendant soon after, appear questionable. In the light of the above, the plaintiffs single act in petitioning to wind up lies heavily within the realm of acting 'against the company's interests' as construed in the context of the authorities cited.

[58] Thus, on the authority of *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65, the right of inspection is unqualified, but where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears.

[59] Likewise in the instant case, on the basis of the evidence before this court, this court is satisfied that the intention of the plaintiffs in inspecting the books does not appear to be borne out of altruistic motives. However, the question remains. Is the evidence of ulterior motive sufficient to dissipate the rights of inspecting the records by the plaintiff directors?

[60] Despite the inimical conduct of the plaintiffs, this court is mindful of the observation of Kau Ting Chu JC in *Welch v Britania Industries Pte Ltd* [1993] 1 SLR, who said:

> It is not for the Court at the hearing of an application (to inspect accounts and records) to go into the disputes between the contending parties and I will not deal with the charges and counter charges of the plaintiffs and Rajen Pillai (Defendant), beyond saying that they show clearly that the plaintiffs were concerned over the company's account before they made their application.

[61] Even so, the odds against the plaintiff directors in the instant case are overwhelming, and this court is inclined to view that the plaintiffs have manifested strong propensities of acting in breach of their fiduciary duty towards the company.

[62] However, this court is reluctant to affirmatively find that the burden of proof had been discharged since no 'real ground' can be positively asserted.

[63] A second, but nevertheless a critical point in this application is the question of whether the undertaking given by the auditor is good undertaking within the legal framework of s 167(6) Companies Act 1965.

[64] In the instant case, the plaintiffs application under s167(6) Companies Act 1965 brings the court's discretion to grant relief into focus, even if that discretion is but a narrow one.

[65] As authorities such as *Welch & Anor v Britania Industries Pte Ltd* [1993] SLR 673 have shown, where appropriate, the court may order that the accounting and other records be open to inspection by an approved company auditor acting for a director. The court will only grant the order upon a written undertaking given to the court that the information required by the new auditor during his inspection must not be disclosed by him to anyone other than to the instructing director.

[66] Thus, as a another of general principle, the court has limited discretion to refuse to grant such an order (see *Re Funerals of Distinction Pty Ltd* [1963] NSWR 614), unless improper motives against the company is made out.

[67] In the instant case, the plaintiffs application under s 167(6) of the Companies Act 1965 brings the court's discretion to grant relief into focus, even if that discretion is but a narrow one.

[68] As authorities such as *Berlei Hestia fNZ) Ltd v Feryhough* [1980] 1 SLR 673 have shown, the court as a matter of general principle, has limited discretion to disallow a director's application under s 167(6), since a director's right under s 167(6), is not fettered, save where a strong case for refusal is made out.

[69] Since the court's discretion in s 167(6) hinges on the letter of undertaking to be furnished therein, it behoves us to look at the meaning of the word of in question.

[70] An 'undertaking' is defined in *Burton's Legal Thesaurus* (3rd Ed), as 'agreement, assurance, commitment, contract, warrant'.

[71] In the words of Hashim Yeop Sani FJ in *Michael C Solle v United Malayan Banking Corporation* [1984] 1 CLJ 151:

> … The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language they used. They are presumed to have intended what they said.

[72] Then, in *Re Choe Kuan Him, Advocate & Solicitor, T Damodran v Choe Kuan Him* [1975] 1 LNS 143, Syed Agil Barakbah J, observed that:

> ... great care ought therefore to be paid to wording of an undertaking both by the solicitor giving it and by the person accepting. It must be clearly worded so as to express the intentions of both parties and this is all the more so when the undertaking is given to a person who is not a solicitor …

[73] In the instant case, the requirements of the undertaking is statutory. In the light of the cases cited, great care too ought be taken to strictly observe the language expressed in s 167(6) in formulating the undertaking.

[74] Since the words, of s 167(6) are clear and straightforward, the common and universal principle is that 'an agreement ought to receive that construction which its language will admit' (per Syed Agil Barakbah FJ at p 267).

[75] Consider again the form the letter of undertaking took in the instant case, and compare it with the language in s 167(6). To reiterate, s 167(6) provides that the court may make an order:

> … but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him *except to that director.* (Emphasis added.)

[76] The undertaking furnished by the auditor does not comply with the express requirements of s 167(6) in that:

(i) it is not addressed to the court or to anyone in particular;

(ii) the auditor has extended the class of persons to whom he may disclose the results of his inspection to his own officers, employees, appointed servants or agents and to the appointed servants and/or appointed servants/agents of the plaintiff.

[77] From this, it is clear that the letter of undertaking is found wanting. It is in fact bad, and by virtue of the words 'but only upon an undertaking' the power to make the order sought by the plaintiffs has not arisen due to the plaintiffs failure to furnish the required undertaking.

[78] It is critical that the undertaking be read in conjunction with the language of s 167(6), which provides a narrow approach since strict observance is a requisite. However, the undertaking given by the plaintiffs auditor takes a liberal approach where it had arbitrarily extended the category of persons to whom the auditor may disclose the results of his

inspection, ie to his own 'officers, employees, approved servants or agents' and to the appointed servants and/or appointed servants/agents of the plaintiffs.

[79] It is this court's view that the language of s 167(6) is precise and is therefore more than just an adjunct. It is clear that though the right to inspect accounting and other records under s 167(6) requires the court to exercise its discretion in allowing auditors to inspect such records on behalf of the directors concerned, the discretion reposed in the court must be grounded on the precise requirements under statute. This necessarily means that when the undertaking is conditional, the conditions must be fulfilled before the undertaking will be enforced.

[80] In that connection in finding the letter of undertaking defective for non-compliance with statutory requirements, this court's discretion has not arisen, and consequentially this court is precluded from considering this application at all.

[81] In any case, the plaintiff's subsequent attempt at an otherwise defective letter of undertaking is feeble and unsustainable.

[82] Thus, the plaintiff's dismal failure in putting up a good undertaking puts this application in jeopardy, and on that ground the plaintiff's application is dismissed with costs.

Application dismissed with costs.

Reported by Andrew Christopher Simon